Jawi Ak Landu v Sunny Inspiration Sdn Bhd and Anor

HIGH COURT (KUCHING) — SUIT NO 22–83 OF 2004–II
HAMID SULTAN JC
22 JUNE 2007

Civil Procedure — Injunction — Erinford Injunction — Principles and purpose of an Erinford Injunction — Powers to grant and when such powers are exercised by the court — Usefulness of an Erinford Injunction to maintain the status quo of the appeal

Upon the plaintiff's application for an interim injunction (encl 6) being dismissed, the plaintiff then filed this application to seek prayers in the form of an Erinford injunction to maintain the status quo pending the appeal to the Court of Appeal. The first defendant's grounds for opposing the plaintiff's application were, inter alia, that (a) the plaintiff had failed to demonstrate and/or adduce any cogent evidence of their locality and/or boundaries of the said land over which they were seeking an Erinford injunction; (b) the first defendant denied that the plaintiff had any native customary rights over the disputed area; (c) the plaintiff had yet to adduce any confirmation by the Department of Land and Survey of alleged claims of native customary rights over the disputed land; and (d) the first defendant would suffer prejudice if an Erinford injunction was granted as the first defendant had been kept from exercising its rights which were properly granted to them under the timber licence, despite having paid the requisite fees, duties and/or levies.

Held, dismissing the application with costs:

(1) Where an applicant has failed in his interlocutory application for an interim injunction, he may appeal against the said decision and at the same time apply for an interim injunction to restrain the other party from dealing with the subject matter of the action pending the appeal. Such an interim injunction pending appeal is known as an Erinford injunction. The principle governing this form of injunction is to preserve the status quo pending the determination of an appeal so that the appeal will not be rendered nugatory. However, such orders are very rarely given and are not a general norm (see para 12).

(2) The nature of Erinford injunction is one which the court always have powers to grant under its inherent jurisdiction. However, this power is exercised by the courts on its own motion itself to protect the justice of the case when the judge is not sure of his judgment or feels the plaintiff's argument may have some prospect of success (see para 14).

(3) For the purpose of maintaining the status quo of the appeal, the relevant orders may be obtained pursuant to s 44 of CJA 1964 from the Court of Appeal. If there has been no orders made by the High Court the provision of section 43

of CJA 1964 will not apply. To say it will apply will lead to numerous applications before the High Courts in the nature of an Erinford injunction and such interlocutory applications must not be entertained as it will not serve useful purpose. This is so because in almost all cases the judge who makes no order will not want to make another one inconsistent with that earlier order, especially when he had decided on the merits of the application (see para 14).

(4) Obiter

For the purpose of maintaining the status quo of the appeal, the relevant orders may be obtained pursuant to section 44 of CJA 1964 from the Court of Appeal. If there has been no orders made by the High Court the provision of section 43 of CJA 1964 will not apply. To say it will apply will lead to numerous applications before the High Courts in the nature of an Erinford injunction and such interlocutory applications must not be entertained as it will not serve useful purpose. This is so because in almost all cases the judge who makes no order will not want to make another one inconsistent with that earlier order, especially when he had decided on the merits of the application (see para 14).

[Bahasa Malaysia summary

Setelah permohonan plaintif untuk injunksi sementara (lamp 6) ditolak, plaintif kemudiannya memfailkan permohonan untuk memohon dalam bentuk injunksi Erinford bagi mempertahankan status quo sementara menunggu rayuan di Mahkamah Rayuan. Alasan defendan pertama untuk menentang permohonan plaintif adalah, antara lain, bahawa (a) plaintif telah gagal untuk menunjukkan dan/atau mengemukakan keterangan yang jelas terhadap kawasannya dan/atau sempadan tanah tersebut di mana mereka telah memohon untuk injunksi Erinford; (b) defendan pertama menafikan bahawa plaintif mempunyai hak-hak kelaziman (adat) penduduk asal terhadap kawasan yang dipertikaian; (c) plaintif masih belum mengemukakan sebarang pengesahan daripada Jabatan Tanah dan Ukur ke atas tuntutan yang dikatakan hak-hak kelaziman (adat) penduduk asal terhadap tanah yang dipertikaikan; dan (d) defendan pertama akan mengalami prejudis jika injunksi Erinford diberikan memandangkan defendan pertama masih terus mengamalkan hak-hak tersebut yang telah diberikan secara betul kepada mereka di bawah lesen pembalakkan, walaupun telah membayar yuran yang diperlukan, duti-duti dan/atau levi-levi.

Diputuskan,menolak permohonan dengan kos:

(1) Bila pemohon telah gagal dalam permohonan interlokutori untuk injunksi sementara, beliau boleh merayu terhadap keputusan tersebut dan pada masa yang sama memohon untuk injunksi sementara untuk menahan pihak lain dari berurusan dengan perkara subjek tindakan sementara menunggu rayuan. Injunksi sementara tersebut sementara menunggu rayuan dikenali sebagai injunksi Erinford. Prinsip yang menguasai bentuk injunksi ini adalah untuk memelihara status quo sementara menunggu pemutusan rayuan supaya rayuan

tidak akan menjadi sia-sia. Walaubgaimanapun, perintah-perintah tersebut adalah amat jarang dan bukanlah amalan biasa (lihat perenggan 12).

(2) Jenis injunksi Erinford adalah satu di mana mahkamah selalunya mempunyai kuasa untuk memberikan di bawah bidang kuasa sedia ada. Walaubagaimanapun, kuasa ini diamalkan oleh mahkamah-mahkamah atas usulnya sendiri untuk melindungi keadilan kes bila hakim tidak pasti dengan penghakimannya atau merasakan pertikaian plaintif mungkin mempunyai peluang untuk berjaya (lihat perenggan 14).

(3) Bagi tujuan mempertahankan status quo rayuan, perintah-perintah relevan boleh diperolehi menurut s 44 AMK 1964 daripada Mahkamah Rayuan. Jika tiada perintah dibuat oleh Mahkamah Tinggi peruntukkan s 43 AMK 1964 tidak akan terpakai. Untuk mengatakan bahawa ia menjadi terpakai akan membawa kepada banyak permohonan di hadapan Mahkamah Tinggi tidak ubah seperti injunksi Erinford dan permohonan interlokutori tersebut hendaklah tidak dilayan kerana ia akan membawa kepada tujuan yang tidak berguna. Ini adalah kerana dalam hampir kesemua kes hakim yang tidak membuat perintah tidak akan membuat sesuatu yng tidak konsisten dengan perintah terdahulu, terutamanya bila beliau telah memutuskan ke atas merit-merit permohonan (lihat perenggan 14).

(4) Obiter

Pentadbiran keadilan sivil akan berjalan dengan cepat dan cekap jika terdapat undang-undang bagi mengehadkan kesemua permohonan-permohonan interlokutori. Kebanyakan masa kehakiman terbuang mendengar permohonan-permohonan yang tidak produktif. Undang-undang hendaklah khususnya mengatakan bahawa permohonan-permohonan interlokutori tidak boleh difailkan tanpa kebenaran mahkamah dan kebenaran tersebut hendaklah bukan melalui permohonan tetapi menerusi permohonan lisan dan kebenaran diperolehi pada peringkat pengurusan kes. Pengeculian adalah untuk bahagian-bahagian tertentu, iaitu injunksi atau relief-relief sementara lain yang segera dan yang tidak dapat dielakkan (lihat perenggan 14).]

Notes

For cases on Erinford Injunction, see 2(1) *Mallal's Digest* (2003 Reissue, 4th Ed) paras 2602-2609.

Cases referred to

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (refd)

Cheng Hang Guan & 2 Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

Chong Wooi Leong & 29 Ors v Lebbey Sdn Bhd [1998] 2 AMR 1750 (refd)

Clellapa a/l K Kalimuthu v Sime UEP Properties Bhd [1997] 4 AMR 3569 (refd)

Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors (No 2) [1988] 3 MLJ 497 (refd)

Kilang Kosfarm Sdn Bhd v Kosma Nusantara Berhad [2002] 2 AMR 2364 (refd)

Lotteworld Engineering & Construction Sdn. Bhd. v Castle Inn Sdn Bhd & Anor (No 2) [1988] 7 MLJ 50 (refd)

A *Malaysia Building Society Berhad lwn Orion Express (M) Sdn Bhd (dan Rayuan Yang Lain)* [2006] 5 AMR 723 (refd)
Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor v Perdana Merchant Bankers Berhad (dahulunya dikenali sebagai Intradagang Merchant Banks (M) Berhad) (and 4 Other Appeals) [2001] 3 AMR 2893 (refd)
B *Metramac Corporation Sdn Bhd (Formerly known as Syarikat Teratai KG Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 3 AMR 725 (refd)
Penang Port Commission v Kanawangi s/o Seperumaniam [2003] 2 AMR 449 (refd)
Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors [1988] 1 MLJ 178 (refd)
C *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (refd)
Silver Concept Sdn. Bhd. v Brisdale Rasa Development Sdn Bhd (Dahulunya dikenali sebagai Ekspedisi Ria Sdn Bhd) [2002] 3 AMR 3689 (refd)
Tahan Steel Corporation Sdn. Bhd. v Bank Islam Malaysia Berhad (No. 2) [2004] 3 AMR 507 (refd)
D *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertuan Negeri Sabah & Datuk Joseph Parim Kitingan* [1986] 2 MLJ 391 (refd)

Legislation referred to

E Courts of Judicature Act 1964 ss 43, 44

Daisy Tham Yek Ngo (Kilat Beriak with her) (Tham & Co) for the plaintiff.
Allan Lao (David Allan Sagah & Teng) for the first defendant.

Hamid Sultan JC:

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[1] This is my judgment in respect of the plaintiff's application, encl 108 seeking an order in the nature of Erinford injunction on the grounds that the plaintiff's application for interim injunction was dismissed and pending the appeal to the Court of Appeal the prayers in this application is necessary to maintain the status quo.

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[2] The parties rely on the following authorities, namely:

(i) *Erinford Properties Ltd v Cheshire County Council* (1974) 2 All ER 448 (ii) *Clellapa a/l K Kalimuthu v Sime UEP Properties Bhd* [1997] 4 AMR 3569 (iii) *Kilang Kosfarm Sdn Bhd v* H *Kosma Nusantara Berhad* [2002] 2 AMR 2364 (iv) *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad (No. 2)* [2004] 3 AMR 507 (v) *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 MLJ 178 (vi) *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertuan Negeri Sabah & Datuk Joseph Parim Kitingan* [1986] 2 MLJ 391 (vii) *Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors (No 2)* [1988] 3 MLJ 497 (viii) *Lotteworld* I *Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor (No 2)* [1988] 7 MLJ 50 (ix) *Chong Wooi Leong & 29 Ors v Lebbey Sdn Bhd* [1998] 2 AMR 1750 (x) *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (Dahulunya dikenali sebagai Ekspedisi Ria Sdn Bhd)* [2002] 3 AMR 3689 (xi) *Penang Port Commission v Kanawangi s/o Seperumaniam* [2003] 2 AMR 449 (xiv)*Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor v Perdana Merchant Bankers Berhad (dahulunya dikenali sebagai Intradagang*

Merchant Banks (M) Berhad) (and 4 Other Appeals) [2001] 3 AMR 2893 (xii) *Malaysia Building Society Berhad lwn Orion Express (M) Sdn Bhd (dan Rayuan Yang Lain)* [2006] 5 AMR 723 (xiii) *Metramac Corporation Sdn Bhd (Formerly known as Syarikat Teratai KG Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 3 AMR 725 (xiv) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[3] The plaintiff's claim as per the statement of claim can be summarised as follows:

(a) the plaintiff bring the action on his own behalf as well as on behalf of all other proprietors, occupiers, holders and claimants of native customary land at Rumah Jawi Ak Landu, Awas, Krian, Saratok, Sarawak. (b) the plaintiff has created and/or acquired individual and/or communal native customary rights over the lands surrounding their village, Rh. Jawi, Awas, Krian, Saratok, (c) the first defendant applied for and was issued a timber licence ('the said licence') to take forest produce and/or timber from an area approximately 1090 hectares located in the Ulu Sg. Paku/Sg. Kalas/Sg. Kau Stateland ('the said licensed area'). The said licence was issued by the second defendant on 1 March 2004 expiring on 28 February 2005, (d) the said licensed area is in fact not a forest per se but an occupied, cultivated and properly maintained customary land belonging to the plaintiff. There exists within the said licensed area, inter alia, the plaintiff's ancestral land namely: 'Tugong' (dumping monument), burial grounds, the 'temuda' (followed land used and to be used for padi plantation), belian, illepenut or engkabang trees, rubber and fruit gardens and 2 small pockets of 'pulau galau enggau buah' ('pulau') belonging to the plaintiff. The said small pockets of 'pulau', which are surrounded by the plaintiff's 'temuda', illepenut or engkabang trees and rubber and fruit gardens, are in fact the plaintiff's private reserve of woodland, herbal plants and fruit trees. The rubber gardens situated in the said licensed area have been planted by the plaintiff and his ancestor in the early 1990s. Some of the said rubber gardens were issued with Jublee Occupation Ticket and stencil numbers by the Brookes and the British Colonial Governments, whereas some are held under customary law, (e) if the first defendant and/or their servants and/or agents and/or contractors and/or licensees are not restrained from carrying out logging activities on the said land within the said licensed area, the plaintiff and his descendants will suffer irreparable loss and damage in that our 'temuda', 'pulau', rubber, belian, illepenut or engkabang trees and fruit gardens, essential supply of water, sources of food, medicinal plants and other basic needs will be completely logged out and destroyed within a matter of a few weeks only. The timbers which are still scattered in the 'pulau' together with the Bintangor and other medicinal plants would also be destroyed.

[4] The plaintiff, inter alia, seeks a number of reliefs in the main suit, mostly declarations for recognition of plaintiff's rights in their ancestral land and to restrain the defendants from interfering with the natives' way of life, relating to the said land.

[5] The plaintiff by encl 6 has filed an interim injunction seeking an order that the first defendant be restrained and an injunction be granted preventing them until trial or further order of the court, whether by themselves and/or by their agents and/or servants and/or contractors and/or assignees or otherwise howsoever, from trespassing on the land areas edged in yellow in the maps annexed hereto ('the said land') and/or taking such forest produce and timber from the said land pursuant to the said licence. The grounds of the application, inter alia, are as follows: (i) the plaintiff has either individually and/or as a group or community created and/or acquired customary rights over the said land; (ii) the second defendant had granted licence to the first

defendant to take forest product, which covers and includes the said land; (iii) the first defendant and/or their agents or servants have actively procured and continue to actively procure contractors and/or loggers to commence logging activities on the said land, despite the plaintiff's protests.

[6] The plaintiff's encl 6 was dismissed with costs and the plaintiff has filed a notice of appeal to the Court of Appeal and now in this application is seeking prayers in the form of Erinford injunction to maintain the status quo.

[7] The first defendant is opposing the plaintiff's claim, inter alia, on the grounds that: (a) the plaintiff has failed to demonstrate and/or adduce any cogent evidence of their locality and/or boundaries of the said land over which they are seeking an Erinford injunction. (b) the 1st defendant denies that the plaintiff has any native customary rights over the disputed area. (c) the department of land and survey is the proper authority vested and empowered to investigate and make findings on any such claims of native customary rights over the land. The plaintiff has yet to adduce any confirmation by the department of land and survey of alleged claims of native customary rights over the disputed land. (d) the 1st defendant will suffer prejudice if an Erinford injunction is granted as the 1st defendant has been kept from exercising its rights properly granted to them under the timber licence despite having paid the requisite fees, duties and/or levies.

[8] To justify the plaintiff's case, the plaintiff submits that he has adduced sufficient materials before the court showing bona fide issues to be tried. Some of these issues are as follows:-

(a) is native customary land recognized under the Common Law and the Sarawak Land Code (Cap.81)? (b) whether the plaintiff has acquired individual and/or communal native customary rights over the said land and are therefore deemed licensees under the provisions of the Sarawak Land Code? (c) where are the exact boundaries of the said land and the exact boundaries of the timber licensed area? And whether the part of the plaintiff's land is sited within the said licensed area? (d) whether this right precludes the first and second defendants from impairing and/or abridging the said rights? (e) whether the first defendant is impairing and abridging the plaintiff's right over the said land? (f) whether the issuance of the timber licence No. T/8383 automatically extinguishes the plaintiff's native customary rights within the concession areas? (g) whether the issuance of the said licence is null and void in as far as it covers and/includes the plaintiff's native customary rights land? and (h) whether the issuance of the said licence was an abridgment and/or an impairing of the plaintiff's native customary rights over their land? (i) whether the first defendant is related or associated with Aliran Berseri Sdn Bhd and hence caught by the terms of the injunction and settlement consent order made in the earlier legal proceedings? These are but only some of the issues that need to be determined at the trial of this action. The plaintiff's action is therefore sustainable in law; (i) the court failed to consider that damages are not an adequate remedy for the plaintiff in this case; (ii) the court failed to appreciate that the justice of the case lies wholly in favour of the plaintiff and in favour of granting the interlocutory injunction pending trial in order to preserve status quo; (iii) the court also failed to take into consideration any of the special factors of this case, inter alia, the natives of Sarawak have been accorded special constitutional protection pertaining to rights over land, that another High Court has granted the plaintiff an injunction based on identical or similar facts, and that State Attorney General for the second defendant does not oppose the application for interlocutory injunction; (j) the boundaries of the plaintiff's land have been properly

demarcated and rentised in accordance with the court order dated 11-06-1998 under Suit No. 22-01-1998-I (SG): see 'JL-32'. The injunction sought for by the plaintiff is clear and can be properly enforced by the Court; (b) the first defendant had earlier given undertaking not to enter the land and commence logging. They have shown no difficulty in complying with such an undertaking. Therefore, it is clearly inconsistent for the first defendant to allege that the interlocutory injunction applied for by the plaintiff is vague and uncertain; (c) in any event, the issue as to the exact boundaries of the plaintiff's land and the timber licence area is a matter to be tried and determined at the trial. The first defendant's dispute of the boundaries of the land in itself shows that there are bona fide issues to be tried; (d) if the court is not comfortable with granting the order as claimed by the plaintiff, the court is empowered to modify the interlocutory injunction accordingly to suit the justice of the case (see *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. The court must be concerned that justice must be done. The court cannot deny the plaintiff an interlocutory injunction to which they would otherwise be entitled simply on the first defendant's allegation that the boundaries are not certain.

[9] On the date of hearing of the application, I had informed the plaintiff that since the plaintiff has filed an appeal it will be more appropriate to seek similar orders from Court of Appeal, pursuant to s 44 Courts of Judicature Act 1964 (CJA 1964), which reads as follows:

(1) In any proceeding pending before the [Court of appeal] any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the [Court of Appeal]; (2) Every application under subsection (1) shall be deemed to be proceeding in the [Court of Appeal]; (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[10] My reasons were three folds. One, an Erinford injunction now is not necessary when suitable statutory remedy is available, pursuant to CJA 1964 and such provision was not available when the case of 'Erinford' was decided in England. The second was that I did not hear the original application for injunction and the application was dismissed with costs by another judge and it is not proper for me to make an order on similar terms which the learned judge had dismissed, after hearing the merits. Thus, the facts of this case do not fit in with 'Erinford' principles. However, I have informed the parties that I am prepared to immediately hear the main suit rather than deal with interlocutory matters. My offer to hear the matter immediately had not received the expected response, notwithstanding the suit was filed as early as 2004.

[11] The plaintiff took the view that I should consider the application for the Erinford injunction and have premised the argument as follows:

(a) the rationale behind an Erinford injunction is aptly explained in the case of *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448:

> On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important

> factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusion; and at the other extreme a judge may be very clear in his conclusion and yet on appeal be held to be wrong. No human being in infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with this decision, recognised that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting an injunction at all. There may, of course be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in Wilson v Church, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuick J applied in the Orion case; and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

(b) It is well-settled that the principle established by the Erinford's case is followed by the Courts in Malaysia. See *Chellapa a/l K Kalimuthu v Sime UEP Properties Bhd* [1997] 4 AMR 3569, where the Court of Appeal referred to 'Interlocutory Injunctions' by Tan Woon Tiang and Koh Kok Wah at p 28:

> On the principle that an appellant must not be deprived of the results of an appeal, the court may grant an injunction pending appeal to restrain an act which will render the appeal nugatory (see Orion Property Trust Ltd). Even if an ex parte application for an interlocutory injunction is dismissed, the court may nonetheless grant an injunction pending the appeal against dismissal of the application (see Erinford Properties Ltd; Dickson Trading; Tun Datu Haji Mustapha bin Datu Harun)..... Such injunction pending appeal have been called Erinford injunction after the Erinford case. An Erinford injunction will be granted only where there is a likelihood of a successful appeal being rendered nugatory or if the plaintiff would not be adequately compensated in damages for temporary damage between the date of hearing and the date when its appeal is heard (Cocoa Processors)... The court has a discretion to grant an injunction and order a stay pending appeal if that is necessary to ensure that the appeal will not be academic (see Minnesota Mining Co; Kuttikevundaw).

(c) In the said case of Chellapa a/l K Kalimuthu (supra), Sime (the defendant) bought a land on which the temple stands, with the intention of converting the land into a housing development scheme. The plaintiff (the president of the executive Ccmmittee of the temple) filed a notice of appeal to Court of Appeal when the court in the first instance set aside an interlocutory injunction restraining Sime from demolishing the temple. Pending the appeal, the

plaintiff applied for an Erinford injunction until the finalisation of the appeal. The Court of Appeal held as follows and granted an Erinford injunction:

> The primary consideration which led me to grant the application for a limited stay till the sitting of the full Court is that Cik Goonting was unable to indicate whether Sime would be prepared to hold back in the mean time notwithstanding that the order made on June 30, 1997, had not been extracted. There was thus a very real danger that the appeal may be rendered nugatory.....This Temple has been there since 1891. The Exco and Sime were aware that when conversion was applied for the State Authority had imposed a special condition protecting the status and situation of the temple. There is a serious question to be tried as to whether the plaintiff has a legitimate interest and expectation which this court should protect....Finally, I think it desirable to draw the attention of all concerned to s 7(1)of the Specific Relief Act 1950 which forbids forcible evictions without a court order

(d) This court has jurisdiction to hear and determine an application for an Erinford injunction: see *Kilang Kosfarm Sdn. Bhd. v Kosma Nusantara Berhad* [2002] 2 AMR 2364; *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Berhad (No. 2)* [2004] 3 AMR 507; *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 MLJ 178. (e) the balance of convenience lies in favour of granting injunction to the plaintiff. Justice Datuk Ian Chin in *Nor Anak Nyawai & 3 Ors v Borneo Pulp Plantation Sdn Bhd & 2 Ors.* [2001] 2 AMR 2222 recognised and highlighted amongst other things, the importance of the evidence of the age of the trees in proving native customary rights over the land, and the prejudicial effect on the trial if the trees had all been felled and destroyed by the loggers. Cognizance of the significance of the ingredients and burden of proving native customary rights as provided in the Sarawak Land Code, Justice Datuk Ian Chin suggested in that case that:

> in future claims to native customary rights should be resolved by an inquiry first before the evidence are destroyed by the destruction of the trees and the bull-dozing of the land through licensing or alienation.

(e) On the other hand, the first defendant suffers no prejudice or loss. The first defendant has not entered the said land and has not commenced its logging operation yet. The first defendant has so far done nothing more than merely offering for sale and dealing in the said licence and/or procuring contractors and/or loggers to commence logging in the said land. If the first defendant is restrained now pending the trial of this action, there is minimal or no inconvenience caused to the first defendant as it is in the early stage of its activities. The situation here can be likened to the situation in the case of *Cheng Hang Guan & 2 Ors v Perumahan Farlim (Penang) Sdn. Bhd & Ors* [1988] 3 MLJ 90 at p 100. In the Cheng Hang Guan's case, the plaintiffs are occupiers of a plot of land where they have established a vegetable farm for generations. The defendants are developers and contractors who wished to clear the land for development. The court held that the balance of convenience lies in favour of the plaintiffs based on the rationale that since 'the defendants were enjoined temporarily from doing something that they have not done before, the only effect of the interlocutory injunction in the event of their succeeding at the trial is to postpone the date at which they have not previously found it necessary to undertake; (g) there is therefore no question of the High Court intervening

with the jurisdiction of the Court of Appeal. Indeed, in the case of *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (Dahulunya dikenali sebagai Ekspedisi Ria Sdn Bhd)* [2002] 3 AMR 3689 where the Court of Appeal commented as follows:

> The proceedings before this Court in this instance would have been unnecessary if the High Court had heard and decided on whether to grant the stay pending the appeal instead of requiring a formal written application to be made. The grant of such a stay by the High Court would not have been an admission by that court that it had erred in making the order that is the subject matter of the appeal and neither would it be inconsistent with the decision that was proposed to be appealed. The High Court should be flexible in the exercise of its discretion when deciding whether to grant a stay.
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> The Federal Court has made it very clear in a subsequent case of *Penang Port Commission v Kanawagi s/o Seperumaniam* [2003] 2 AMR 449, where it was unanimously held thus:
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> (a) Section 43 of the Act has to be construed in the context of the application for injunctive orders made by the appellant. It is clear that the subsequent Court of Appeal had taken the position that as the application was not made in the first instance to the High Court, it was in contravention of s 43 of the Act and that the previous Court of Appeal had no jurisdiction to hear the matter. (b) Such a construction as enumerated above runs counter to the express provisions in s 44 of the Act which specifically confer upon the Court of Appeal the jurisdiction to grant interim orders and make incidental directions in prescribed circumstances. In deciding the application, the Court of Appeal may take into consideration the failure on the part of the appellant in not complying with s 43. It may inquire into the reasons for such failure. If the failure has caused prejudice to the other side resulting in injustice, it is perfectly entitled to reject the application. If no injustice is caused, there is no reason for not granting the application. All those are factors relevant to the exercise of discretion by the Court of Appeal. They do not however adversely affect the jurisdiction of the Court of Appeal in dealing with the said application.
>
> or non-compliance as the ambiguous and contradictory character of the injunctive order has made it impossible for them to comply with the same. The court in that case agreed on the facts that the defendant was not in contempt as the injunctive order obtained was vague and contradictory in terms.

[12] It is correct to say, where an applicant has failed in his interlocutory application for an interim injunction, he may appeal against the said decision and at the same time apply for an interim injunction to restrain the other party from dealing with the subject matter of the action pending the appeal. Such an interim injunction pending appeal is known as an Erinford injunction. The principle governing this form of injunction is to preserve the status quo pending the determination of an appeal so that the appeal will not be rendered nugatory. However, such orders are very rarely given and are not a general norm for reasons I have stated below.

[13] I have read all the affidavits and submissions filed herein in detail. On the facts of this case, I find no merit in the plaintiff's argument, more so when I have clearly

indicated to all parties that I am prepared to hear the suit immediately and dispose it off on merits. Further, the plaintiff has unnecessarily taken much of the court's time by filing a lengthy submission on Erinford principles when I have indicated to the plaintiff that I am not minded to grant the order as the more suitable forum will be the Court of Appeal and I was not the judge who heard the application for injunction. However, the plaintiff's counsel at that point of time informed me that the Court of Appeal will not entertain an application under s 44 of CJA 1964 without satisfying the criteria in s 43 of CJA 1964 which states as follows:

> Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court

[14] The cases the plaintiff relies on relates to stay of the order of the High Court not relating to Erinford injunction. The nature of Erinford injunction is one which the court always have powers to grant under its inherent jurisdiction. However, this power is exercised by the courts on its own motion itself to protect the justice of the case when the judge is not sure of his judgment or feels the plaintiff's argument may have some prospect of success. Once the court dismisses an interlocutory application then the proper course for the aggrieved party is to appeal on that order. Further, for the purpose of maintaining the status quo of the appeal the relevant orders may be obtained pursuant to s 44 of CJA 1964 from the Court of Appeal. If there has been no orders made by the High Court the provision of s 43 of CJA 1964 will not apply. To say it will apply will lead to numerous applications before the High Courts in the nature of Erinford injunction and such interlocutory applications must not be entertained as it will not serve useful purpose. This is so because in almost all cases the judge who makes no order will not want to make another one inconsistent with that earlier order, especially when he had decided on merits of the application.

[15] I take the view that the administration of civil justice will run expeditiously if there is a law to restrict all interlocutory applications. A classic example why it should be is this case where the plaintiff has filed this suit in 2004 and the enclosures is running to encl 151 and it is still at an interlocutory stage. Much judicial time has been wasted hearing non-productive applications. I have myself spent sufficient time to deal with the application and to write this judgment. To arrest further interlocutory application and delay, I have to direct the suit to be disposed of immediately. The law must specifically say that interlocutory applications cannot be filed without the leave of court and such leave must not be by way of application but by oral application and consent obtained at the case management stage. The exception must be for limited areas, namely injunction or other immediate and necessary interim reliefs.

[16] For reasons stated above, I dismiss the plaintiff's application (encl 108) with costs in the cause. I further direct that this matter be fixed for hearing on 4 July 2007 and thereafter to proceed on a day to day basis. This court will not entertain any

application for adjournment unless it is on valid grounds such as that the counsel is not well. The plaintiff in this suit must appear before the court on 4 July 2007 and produce his witness. I hereby order so.

Plaintiff's application dismissed with costs in the cause.

Reported by Eugene Daniel Louis